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INSCT

Institute for National Security
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Syracuse University



The FCPA Landscape: Foreign Corrupt Practices Act Basics

Spring 2013



Introduction to the FCPA

“People should care about the Foreign Corrupt Practices Act because it really has to do with the way American companies, American citizens, conduct themselves overseas.”

–Mark Mendelsohn, Former Leading DOJ Corruption Prosecutor

- ★ The Foreign Corrupt Practices Act of 1977 was enacted to make it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.
- ★ The Department of Justice is the chief enforcement agency, with a coordinating role played by the Securities & Exchange Commission.





Purpose of the FCPA

- ★ Protect businesses domestically: Allow companies to identify their actual costs.
- ★ Protect businesses abroad: Enable companies to identify their costs.
- ★ Protect investors internationally: Permit access to honest and full disclosure business records to allow for better business investment decisions.
- ★ Protect the rule of law.





Why Is the FCPA Important to the Country?

- ★ Foreign bribery makes doing business overseas instable.
- ★ Bribery impedes economic growth because it diverts public resources from important priorities (i.e., education, health, and infrastructure).
- ★ Bribery impedes public accountability and weakens the rule of law.
- ★ Bribery threatens security and stability by facilitating criminal activity within and across borders.
- ★ International corruption undercuts good governance and impedes U.S. efforts to promote freedom and democracy.





Overview of Presentation

1. FCPA Statute and Analysis
2. Recent Trends in FCPA Enforcement
3. FCPA as it Applies to Hypothetical Situations
4. FCPA Best Practices: Developing & Implementing Effective Compliance Strategies





Basics of the FCPA

- ★ The FCPA addresses corruption in two ways:
 1. The anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business.
 2. The accounting provisions impose certain recordkeeping and internal control requirements on users, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or failing to implement a system of internal controls.
- ★ Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies which include: fines, disgorgement, and/or imprisonment. Companies may be disbarred from government contracting for violating the FCPA.





Who Is Covered?

- ★ Three basic categories of persons or entities identified:
 1. Issuers and their officers, directors, employees, agents, and shareholders.
 2. Domestic concerns and their officers, directors, employees, agents, and shareholders.
 3. Certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

- ★ Jurisdiction only applies to payments intended to induce or influence a foreign official to use his or her position “in order to assist ... in obtaining or retaining business for or with, or directing business to, any person.” This requirement is known as the “business purpose test” and is broadly interpreted.





Who Cannot be Bribed?

- ★ It is illegal to make bribes to:
 1. Any foreign official
 2. Any foreign political party or official thereof
 3. Any candidate for foreign political office
 4. Any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these three categories

- ★ A “foreign official” is any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.





The Offense: Elements of a FCPA Anti-Bribery Violation

- ✦ In sum, these provisions prohibit corruptly offering, making, or authorizing a payment of:
 1. Anything of value to any person.
 2. Knowing that it will be offered or given to a foreign official.
 3. To obtain or retain business.





“Anything of Value”

- ★ Cash or cash equivalent
- ★ Gifts or services
- ★ Charitable donations
- ★ Political contributions
- ★ Loans
- ★ Travel expenses
- ★ Sporting events
- ★ Entertainment outings
- ★ Hiring





“Foreign Official”

- ★ A “foreign official” includes any officer or employee of a non-U.S. government, agency, or “instrumentality” of a non-U.S. government.
- ★ The SEC and DOJ liberally construe the term “instrumentality” to cover employees of private company where foreign government owns controlling interest or exercises control.





“Obtain or Retain Business”

- ★ Winning a contract
- ★ Influencing the procurement process
- ★ Circumventing the rules for importation of products
- ★ Gaining access to non-public bid tender information
- ★ Evading taxes or penalties
- ★ Influencing the adjudication of lawsuits or enforcement actions
- ★ Obtaining exceptions to regulations
- ★ Avoiding Contract Termination





Other Liability Under the FCPA

- ★ How else can liability arise under the FCPA?
 - ★ Companies and individuals can be held civilly liable for aiding and abetting FCPA anti-bribery violations if they knowingly or recklessly provide substantial assistance to a violator.
 - ★ Individuals and companies may also be liable for conspiring to violate the FCPA, even if they are not, or could not be, independently charged with a substantive FCPA violation.
 - ★ Companies may be held liable under certain Parent-Subsidiary relationships.
- ★ Cases of extortion or duress
 - ★ Will not give rise to FCPA liability when a payment is made in response to true extortionate demands under imminent threat of physical harm. This cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business.
 - ★ Mere economic coercion does not amount to extortion.





FCPA Affirmative Defenses & Exceptions

- ★ There are two affirmative defenses to the anti-bribery provisions of the FCPA:
 1. The “Local Law” Defense—that the payment was lawful under the written laws of the foreign country.
 2. The “Reasonable and Bona Fide Business Expenditure” Defense—that the money was spent as part of demonstrating a product or performing a contractual obligation.
- ★ The FCPA provides one exception to its anti-bribery provisions, for “facilitating or expediting payments” made in furtherance of routine (non-discretionary) governmental action.





FCPA Affirmative Defenses: Examples

Bona Fide Marketing & Promotion Payments

- ★ Reasonable and bona fide expenditures, such as travel and lodging expenses directly related to:
 - (a) The promotion, demonstration, or explanation of products or services, or
 - (b) the execution or performance of a contract with a foreign government or performances of a contract with a foreign government or agency thereof.
- ★ Travel expenses to United States (FCPA Op. Proc. Rel. 07-01)
- ★ Product samples for testing (FCPA Op. Proc. Rel. 09-01)
- ★ Journalist stipends (FCPA Op. Proc. Rel. 08-03)
- ★ Trips to tourist destinations (US v. Metcalf & Eddy, Inc)





FCPA Exception: Facilitation Payments

- ★ FCPA exempts “facilitation” payments (small “grease” payments) to expedite routine governmental action.
- ★ Limited to payments that “merely move a particular matter toward an eventual act or decision” – applies only when the government official has no discretion in performing duties.
- ★ Payment must be for something to which the payor was already entitled, e.g., the mere receipt of an application, as opposed to approval of the application.
- ★ Best practices suggest prohibition of facilitation payments entirely; 80% of U.S. companies have banned them.





Sanctions for Bribery

★ Criminal

- ★ Corporations are subject to a fine of up to \$2,000,000.
- ★ Officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years.
- ★ May be much higher under the Alternative Fines Act.

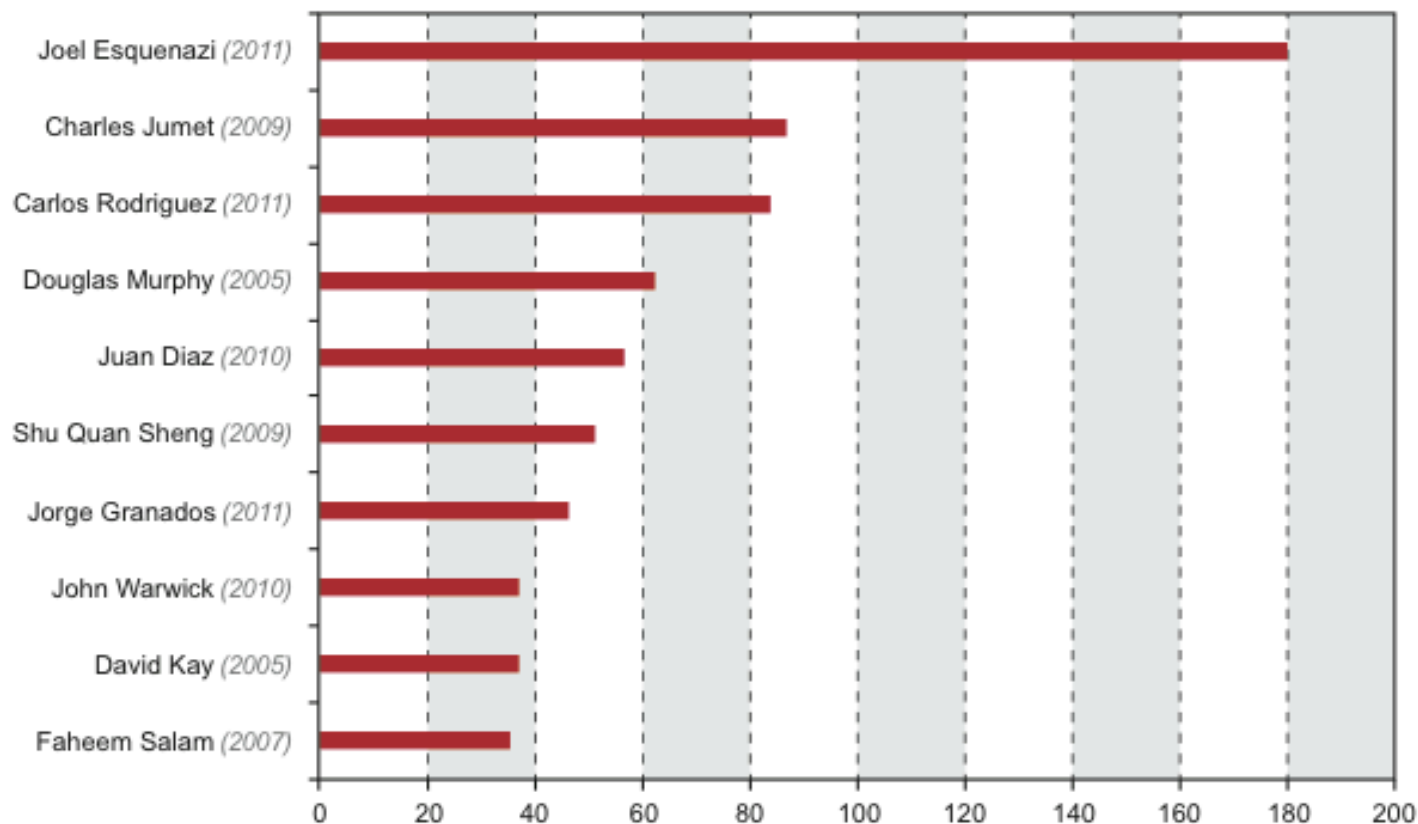
★ Civil

- ★ Up to \$10,000 for a firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm.
- ★ Suspension or debarment from Federal procurement programs.
- ★ In an SEC action, the court can impose an additional fine (\$5,000-\$100,000 for a natural person, \$50,000-\$500,000 for others.)





Chart 2: Longest FCPA-Related Prison Sentences
(Total Sentence in Months, Including for Non-FCPA Counts)

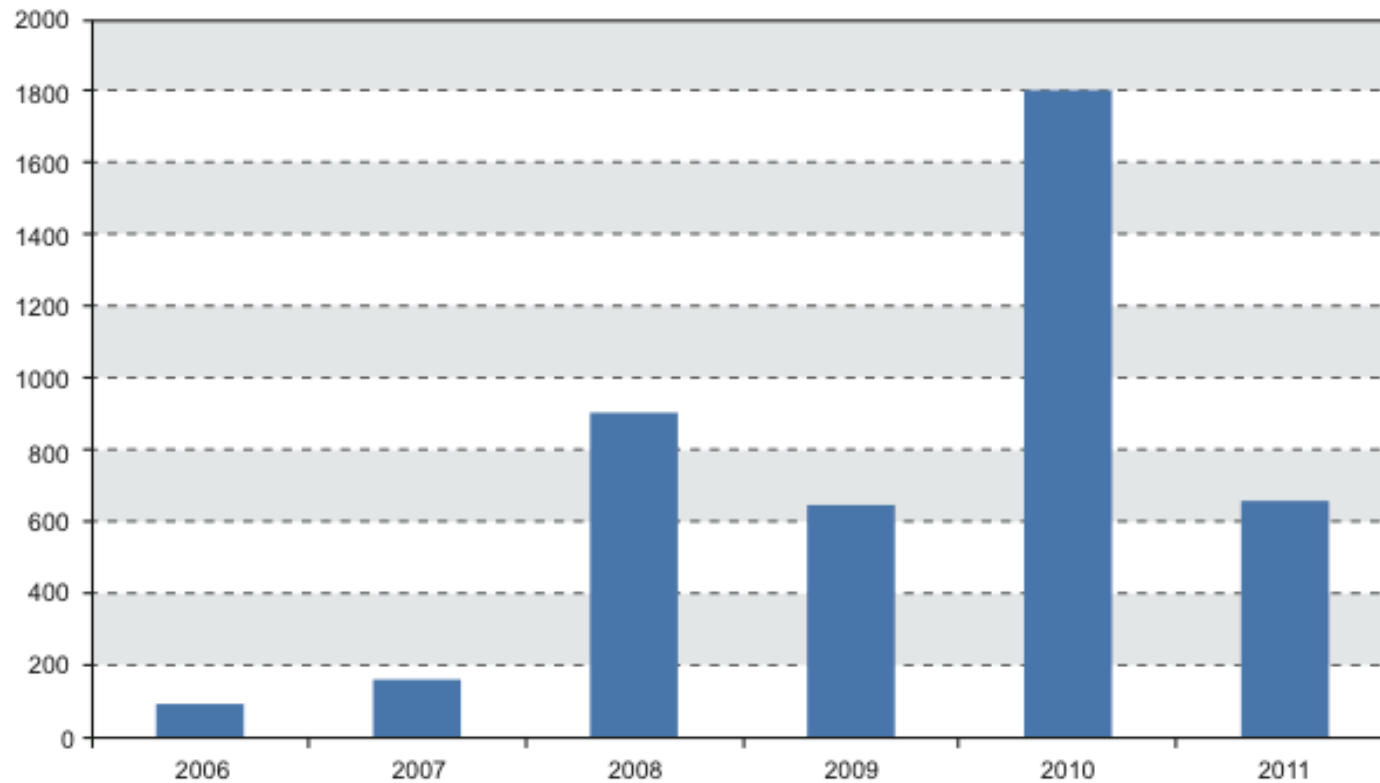


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Chart 1: Total FCPA Penalties Assessed (In US\$ Millions)



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Sanctions for Bribery

- ★ Other governmental actions
 - ★ May be ruled ineligible to receive export licenses.
 - ★ The SEC may suspend or bar from the securities business.
 - ★ The Commodity Futures Trading Commission and the Overseas Private Investment Corporation may suspend or debarment from agency programs.
- ★ Private cause of action
 - ★ Shareholders may bring private causes of action against company officers and directors for misconduct and malfeasance.





Accounting Provisions

- ★ These impose certain recordkeeping and internal control requirements on users, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failing to implement an issuer's system of internal controls.
- ★ DOJ may use these to provisions to indict companies for FCPA violations because the burden of proof is easier to satisfy than that of the bribery provisions.





FCPA Enforcement



“[T]he Department’s enforcement of the FCPA is aggressive, and it’s on the rise... This year alone, we’ve collected well over \$1 billion already... [L]ast year and this year combined, we’ve charged over 50 individuals. Moreover, last year we tried three FCPA cases successfully to verdict... and approximately 35 individuals currently await trial on FCPA charges in the United States. In all, our message to companies and individuals who would bribe foreign officials is clear: foreign bribery is not an acceptable way of doing business, and we won’t tolerate it.”

— Lanny Breuer, Assistant Attorney General (Criminal Division)

Nov. 4, 2010





Increasing FCPA Enforcement

- ★ Corporate mega fines fueled by voluntary disclosure process.
- ★ DOJ has dedicated additional prosecutors to FCPA cases and is increasing use of industry-wide investigations.
- ★ FBI has dedicated FCPA squad and is using aggressive investigative tactics.
- ★ Dodd-Frank whistleblower bounty program will increase prosecutions exponentially.
- ★ SEC states that it receives 1-2 credible whistleblower complaints each day.





FCPA Enforcement Is an SEC Priority



“The SEC and Justice Department are sending a clear message that those who engage in corrupt activities face a strong and united front around the world.”

— Mary L. Schapiro, SEC Chairman
July 9, 2010





Whistleblower Provisions Increase Risk

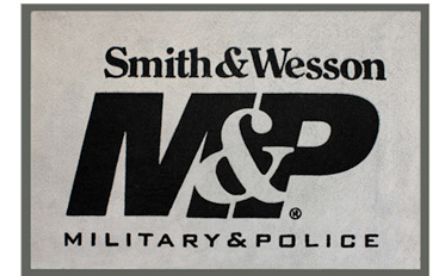
- ★ Dodd-Frank bill created whistleblower bounty program which authorizes whistleblowers to recover between 10 and 30 percent of any settlement that exceeds \$1 million.
- ★ SEC has proposed regulations, selected chief of program and requested funding for 43 new positions.
- ★ Businesses have filed comments opposing regulations claiming that program creates incentives for whistleblowers to avoid internal reporting programs.





Contractor Cases

- ★ January 2010: DOJ unsealed indictments of 22 individuals from the law enforcement and military equipment industries, one was former Vice President-Sales, International & U.S. Law Enforcement.
- ★ February 2012: DOJ filed a motion to dismiss with prejudice the indictments of the remaining defendants who are pending trial, including Smith and Wesson former Vice President-Sales, International & U.S. Law Enforcement
- ★ February 24, 2012: the district court granted the motion to dismiss.
- ★ SEC is still investigating this matter, and further charges might develop.





FCPA Enforcement Trends: Defense & Contractors

- ★ Allied Defense Group (ADG) employed Mark Frederick Morales (A defendant in the Africa Sting Case).
- ★ February /March 2012: DOJ dismissed charges against all individuals indicted in a FCPA sting operation, including the former employee of MECAR USA. Since this time, “[ADG]’s FCPA counsel has had several discussions with the DOJ and SEC regarding the agencies’ respective inquiries. . . it appears likely that resolution of these inquiries will involve a payment by the [ADG] to at least one of these government agencies. At this point, the amount of this payment is undeterminable.”
- ★ Investigation continues, with possible liability and payment required to DOJ or SEC.





Contractor Cases

- ★ July 2011: Armor Holdings entered into a non-prosecution agreement with DOJ. Which recognized Armor Holding's complete disclosure of their conduct, Armor Holding's self-investigation and cooperation with the DOJ and SEC, and the company's extensive remedial efforts. Armor Holdings agreed to cooperate with all investigations and prosecutions arising out of the conduct and agreed to pay a monetary penalty of \$10,290,000.
- ★ Separately, in an agreement with the SEC, Armor Holdings consented to entry of a permanent injunction against further violations and agreed to pay \$1,552,306 in disgorgement, \$458,438 in prejudgment interest, and a civil money penalty of \$3,680,000.





Contractor Cases

- ★ In August 2012, DOJ ended its foreign bribery probe of Academi LLC, the company formerly known as Blackwater Worldwide, without filing charges.
- ★ “Based upon [DOJ]’s investigation and the information that you have made available to date, we have closed our inquiry into this matter,” the letter said. “We have taken this step based on a number of factors, including...the investigation undertaken by Academi and the steps taken by the company to enhance its anti-corruption compliance program.”
- ★ **TAKEAWAY:** Blackwater/Academi’s efforts to cooperate with investigators, to investigate these matters internally, and to enhance its corruption program likely contributed to DOJ’s declination to prosecute.





Contractor Cases

- ★ March 2010: BAE Systems pled guilty to conspiring to defraud the United States by violations which included making false statements about its Foreign Corrupt Practices Act (FCPA) compliance program, and were ordered to pay \$ 400 million.
- ★ BAE represented to various U.S. government agencies that it would create and implement policies and procedures to ensure its compliance with the anti-bribery provisions of the FCPA, but that, BAE knowingly and willfully failed to create mechanisms to ensure compliance with these legal prohibitions on foreign bribery.
- ★ BAE made a series of substantial payments to shell companies and third party intermediaries that were not subjected to the degree of scrutiny and review to which BAE told the U.S. government the payments would be subjected.

BAE SYSTEMS





Applying the FCPA to Practice: Hypotheticals





Hypothetical: Gifts, Travel & Entertainment

You work for Patriot Contracting (Patriot). Patriot spent millions of dollars on 315 trips to “inspect and train” Iraqi government officials in using Patriot’s equipment. However, during most of the trips, the Iraqi officials spent little or no time visiting Patriot’s facilities and instead visited tourist destinations (i.e., Hawaii, Las Vegas, New York City). The locations were chosen by the Iraqi officials and lasted two weeks costing \$25,000 to \$55,000 per trip. Patriot paid lodging, transportation, food, entertainment and gave the Iraqi officials between \$500 and \$1,000 spending money per day. Was there a violation of the FCPA?

This was a clear violation of the FCPA.



Hypothetical: Gifts, Travel & Entertainment

You work for Liberty Contracting (“Liberty”). You and some of the other executives are in Afghanistan for meetings with Afghan government officials. One of the officials was recently married and you offer a moderately priced crystal vase to the official as a wedding gift. Was this a violation of the FCPA?

This was not a violation of the FCPA.

It is appropriate to provide tokens of esteem or gratitude. The gift must be made openly and be properly accounted for in Company books.



Hypothetical: Facilitating Payments

You work for Patriot Contracting, who retains an agent in a Iraqi to assist in obtaining the required permits including an environmental permit to build a road. Your boss is the vice president of Patriot Contracting, Mr. Smith.

- ★ The agent informs Mr. Smith for international operations that he plans to make a small one time cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously (as the agent has experienced delays of three months in the past when this “grease” payment was not made). The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment. Was this a violation of the FCPA?
- ★ *No. The “grease” payment to the clerk was not a violation of the FCPA* because this payment qualifies as a facilitating payment. The payment was a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive. However, this payment may violate other laws. Moreover, if the payment is not accurately recorded, it could violate the FCPA accounting provisions





Facilitating Payments (cont.) ...

- ★ A few months later the agent informs Mr. Smith that the planned road construction would adversely impact an environmentally sensitive and protected wetland. As such, there are problems with the environmental permit. The problem could be overcome by re-routing the road at a cost to Patriot of \$1 million. The agent tells Mr. Smith that a modest cash payment to the director of the environmental agency would make the problem go away. Mr. Smith authorizes the payment. After receiving the payment, the director issues the permit and Patriot constructs its new road through the wetlands. Was this a violation of the FCPA?
- ★ Yes. *The payment to the director to override the environmental issues was a violation of the FCPA.* The payment was designed to corruptly influence a foreign official into improperly approving a permit. This was a discretionary act that Patriot should not have received. Accordingly, Patriot, Mr. Smith, and the local agent may all be prosecuted for authorizing payment of the bribe.





Hypothetical:

Determining FCPA Jurisdiction

- ★ Liberty Contracting (“Liberty”) operates globally but has its principal place of business in New York. Liberty enters an agreement with a European company (“Sovereign”) to submit a joint bid to the Oil Ministry to build a refinery in Iraq. Executives of Liberty and Sovereign meet in New York to discuss how to win the bid and decide to hire a third party consultant. The plan is for the consultant to use part of his “commission” to bribe high-ranking Iraq officials within the Oil Ministry. The consultant meets with the executives of Liberty and Sovereign in New York to finalize the scheme. Who is within the FCPA’s jurisdiction?
- ★ *All entities fall within the FCPA’s jurisdiction.* Liberty is both an “issuer” and “domestic concern” under the FCPA. The consultant is an “agent” of Liberty. Sovereign and consultant are also subject to the FCPA’s territorial jurisdiction based on their conduct in the US. Additionally, even if Sovereign and consultant never stepped in the US, they may be subject under conspiracy law.





Hypothetical: Duress

- ★ You work for Independent Contracting (Independent). An Afghan official demands payment or states that an oil rig will be dynamited. You authorize the payment. Was this an FCPA violation?
 - ★ *This is not an FCPA violation* because the payment lacks the requisite corrupt purpose. Thus, the payment was made under duress.
- ★ An Iraqi official demands payment of Independent to gain entry into the oil market or to obtain a contract in Iraq. You authorize the payment. Was this a violation of the FCPA?
 - ★ *This was a violation of the FCPA.* It does not matter that the payment was first proposed by the Iraqi official. This economic coercion is not enough. As such, a payment of this type violates the FCPA.





FCPA Best Practices: Developing & Implementing Effective Compliance Strategies

“In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, DOJ and SEC also consider the adequacy of a company’s compliance program when deciding what, if any, action to take.”

–FCPA: A Resource Guide in the U.S. Foreign Corrupt Practices Act, by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission





Hallmarks of Effective Compliance Programs

- ★ Commitment from Senior Management and a clearly articulated policy against corruption
- ★ Code of conduct and compliance policies and procedures
- ★ Oversight, autonomy, and resources
- ★ Risk assessment
- ★ Training and continuing advice
- ★ Incentives and disciplinary measures
- ★ Third party due diligence and payments
- ★ Confidential reporting and internal investigation
- ★ Continuous improvement: Periodic testing and review
- ★ Mergers and acquisitions: Pre-acquisition due diligence and post-acquisition integration





Other Useful Links

- ★ <http://www.sec.gov>
- ★ <http://www.justice.gov>
- ★ <http://insct.syr.edu>
- ★ <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html>





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